Veto

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

LEGISLATIVE LIAISON
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SPECIAL

May 9, 1984

LEGISLATIVE REFERRAL MEMORANDUM

TO: LEGISLATIVE LIAISON OFFICER

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SUBJECT: Draft DOJ report on S.J.Res. 135, "proposing an amendment to the Constitution of the United States for the establishment of a legislative veto."

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than

COB Tuesday, May 15, 1984

Direct your questions to Branden Blum (395-3802), the legislative attorney in this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosure

cc: B. Bedell
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Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Strom Thurmond
Chairman, Committee on the
Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter is in response to your request for the views of the Department of Justice on S.J. Res. 135, "proposing an amendment to the Constitution of the United States for the establishment of a legislative veto." The Department of Justice believes that the constitutional amendment proposed by this resolution would substantially eliminate the carefully drawn checks on the exercise of legislative power that were included in the basic constitutional framework of our Nation, and would drastically and unnecessarily alter the existing relationships between the three coordinate Branches of the federal government. Consequently, the Department of Justice recommends against adoption of S.J. Res. 135 and transmittal of it to the states for ratification.

The language of the constitutional amendment proposed by S.J. Res. 135 reads as follows:

> Section 1. Executive action under legislatively delegated authority may be subject to the approval of one or both Houses of Congress, without presentment to the President, if the legislation that authorizes the executive action so provides.

The clear intent of the proposed amendment is to abrogate the Supreme Court's decision in INS v. Chadha, 103 S. Ct. 2764 (1983), holding "legislative veto" devices to be unconstitutional. In Chadha, the Court made clear that under the "carefully designed limits" imposed by the Framers on the powers of the coordinate Branches, Congress must exercise its legislative power in strict conformity with the require-

ments of Art. I, §§ 1 and 7 of the Constitution: passage by a majority of both Houses and presentment to the President for approval or veto. 103 S. Ct. at 2786-87. S.J. Res. 135 would nullify the Chadha decision by amending the Constitution to allow Congress to take action that alters the authority of the Executive to exercise statutorily delegated responsibilities by vote of either one or both Houses, without presentment to the President. 1/

We believe that the proposed constitutional amendment would be a wholly unwarranted and unwise alteration of the "enduring" and "carefully designed limits" imposed by the Framers on the powers of the coordinate Branches, INS v. Chadha, 103 S. Ct. at 2787. As the Court emphasized in Chadha, those limits were no accident of history. The debates surrounding adoption of the Constitution leave no doubt that the procedure established in that document for the exercise of legislative power was not a mere formality or unintended limitation on legislative authority. To the contrary, the constitutional requirements that power be divided among the Legislative, Executive, and Judicial Branches, and that all measures having the effect of a law must receive the concurrence of both Houses and must be presented to the President for approval or disapproval were intended to be fundamental checks against oppressive, improvident, or precipitate action by the Legislative Branch and encroachment by that Branch upon the Executive.

The legislative process devised by the Framers in Article I of the Constitution reflects three underlying structural components: separation of powers, bicameralism, and presentment. As discussed below, each of these components is vitally important to the functioning of our constitutional system.

Separation of Powers

The powers of the national government were deliberately divided by the Framers among three coordinate Branches,

1/ The proposed amendment would authorize legislative vetoes by action of one or both Houses, but would not authorize approval or disapproval of Executive actions by one or more congressional committees. Accordingly, we would not read the proposed amendment to alter the effect of the Chadha decision insofar as committee approval, disapproval, or waiver mechanisms are concerned.

because they considered the concentration of governmental power to be the greatest threat to individual liberty. "The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." Buckley v. Valeo, 424 U.S. 1, 122 (1976). The principle of separation of powers is based on the premise that if one Branch of government could, on its own initiative, merge legislative, executive, or judicial powers, it could easily become dominant and tyrannical. In such circumstances, it would not be subject to the checks on governmental powers that the Framers considered a necessary protection of freedom. The three Branches of the Government are not "watertight compartments" acting in isolation of each other. Springer v. Government of the Philippine Islands, 277 U.S. 189, 211 (1928) (Holmes, J., dissenting); see Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Rather, the Framers conceived of national government as involving the dynamic interaction between the three Branches, with each "checking" the others and "balancing" the powers conferred on the others with its own assertions of power.

The separation of powers principle, intended to be a "vital check against tyranny," 2/ and "essential to the preservation of liberty," 3/ is a bedrock principle of our constitutional system, and should not be disregarded. At the core of the principle is the precept that no single Branch can usurp or arrogate to itself the essential functions of other Branches. Since the brilliant men who created our Constitution believed that the concentration of power in any one individual or group was the very definition of tyranny, we would regard any alteration in this separation of powers, mandated by the Constitution, to be a very serious departure from the principles that have guaranteed our liberties for nearly two hundred years.

2/ Buckley v. Valeo, 424 U.S. 1, 121 (1976); see, e.g., The Federalist No. 47 (J. Madison), at 324.

3/ The Federalist No. 51 (J. Madison), at 348; see Youngstown Sheet & Tube Co. v. Sawyer, 348 U.S. 579, 635 (1952) (Jackson, J., concurring).

Bicameralism

Despite the careful separation of powers between the three Branches, the Framers recognized that the Legislature, with the authority to make all laws and to appropriate all money, was the Branch with the greatest potential powers. The Framers were acutely aware that "[i]n republican government the legislative authority, necessarily, predominates." The Federalist No. 51 (J. Madison), at 350. While there was general agreement that the Legislative Branch should set policy, there was also agreement that an internal check was necessary on the power of the Legislature. One of the checks the Framers fashioned against this potential was to require that legislative action receive the approval of both Houses of Congress. James Wilson, later a Justice of the Supreme Court, observed during the debates of the Constitutional Convention:

> Despotism comes on mankind in different shapes. Sometimes in an Executive, sometimes in a military, one. Is there no danger of a Legislative despotism? Theory and practice proclaim it. If the Legislative authority be not restrained, there can be neither liberty nor stability; and it can only be restrained by dividing it within itself, into distinct and independent branches. In a single house there is no check, but the inadequate one, of the virtue & good sense of those who compose it.

1 M. Farrand, The Records of the Federal Convention of 1787 254 (1966) (emphasis added). Madison, expounding upon the necessity of the Senate, noted "the propensity of all single and numerous assemblies, to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders, into intemperate and pernicious resolutions." The Federalist No. 62 (J. Madison), at 418. This propensity would be checked, he maintained, by providing a greater opportunity for due deliberation in the course of consideration by the two differently constituted Houses. Id. at 417-19. See also The Federalist No. 63 (J. Madison), at 426-27. The dangers posed by a Congress comprised of a single House were thus clearly apparent to the Framers. Alexander Hamilton warned that, were the Constitution to provide for only one legislative organ:

> we shall finally accumulate, in a single body, all the most important prerogatives of sovereignty, and thus entail upon our posterity one of the most execrable forms of government that human infatuation ever contrived. Thus we should create in reality that very tyranny which the adversaries of the new Constitution either are, or affect to be, solicitous to avert.

The Federalist No. 22 (A. Hamilton), at 135, quoted in INS v. Chadha, supra, 103 S. Ct. at 2783.

Presentment

Yet another check fashioned by the Framers against the possibility of encroachment by the Legislative Branch upon the independence of the Executive was the requirement of Art. I, § 7, that all legislative measures be presented to the President for approval or disapproval. The Presentment Clauses were intended by the Framers as a "self-executing safeguard" against abuse of legislative power, 4/ and as a "guard[] against ill-considered and unwise legislation." 5/ As the Court pointed out in Chadha, presentment to the President and the presidential veto were considered so imperative that the draftsmen took special pains to assure that these requirements could not be circumvented. See 2 M. Farrand, supra, at 301-02, discussed in INS v. Chadha, 103 S. Ct. at 2782.

There was virtual unanimity at the Constitutional Convention that the President should participate in the legislative process by exercising a veto over proposed legislation. The purpose was threefold. First, presentment to the President would check, as Chief Justice Burger stated in INS v. Chadha, "whatever propensity a particular Congress might have to enact oppressive, improvident, or ill-considered

4/ Buckley v. Valeo, 424 U.S. 1, 122 (1976). See The Federalist No. 51, supra, at 350; see also The Federalist No. 73 (A. Hamilton) at 497; The Federalist No. 66 (A. Hamilton), at 445-46; 1 M. Farrand, supra, at 97-106; id. at 139-40 (remarks of George Mason).

5/ The Pocket Veto Case, 279 U.S. 655, 678 (1929); see also id. at 677-78 n.4; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952); United States v. Rumely, 345 U.S. 41, 46 (1953).

measures." 6/ Second, it would ensure that the legislative process included a national perspective. As the Supreme Court aptly noted in Myers v. United States, 272 U.S. 52 (1926):

> The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide . . . .

272 U.S. at 123, quoted in INS v. Chadha, supra, 103 S. Ct. at 2782-83. 7/ Third, the presentment requirement is necessary to enable the President to defend the powers of the Executive from legislative encroachments. Without the veto power, as Alexander Hamilton observed, the President "would be absolutely unable to defend himself against the depredations of the [Legislative Branch.] He might gradually be stripped of his authorities by successive resolutions, or annihilated by a single vote." The Federalist No. 73 (A. Hamilton), at 494.

The protections of bicameralism and presentment to the President, derived from the underlying principle of separation of powers, were thus no accident of history or lightly considered procedural requirements, but rather a "finely wrought and exhaustively considered procedure" intended to serve what the Framers believed to be essential constitutional functions. INS v. Chadha, 103 S. Ct. at 2784. While compliance with this procedure may result in some inefficiencies or inconveniences, see id. at 2781, those inefficiencies and

6/ INS v. Chadha, 103 S. Ct. at 2782; The Federalist No. 73 (A. Hamilton), at 495-96; see generally 1. J. Story, Commentaries on the Constitution of the United States, §§ 884-893; at 614-21 (3d ed. 1858).

7/ See also INS v. Chadha, 103 S. Ct. at 2784; II Elliot's Debates on the Federal Constitution 448 (1836).

inconveniences are a small price to pay for maintaining an appropriate balance between the coordinate Branches of the Government. The Court's observations in Chadha are particularly relevant:

> The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S. Ct. 863, 96 L.Ed. 1153 (1952). With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

103 S.Ct. at 2788.

The constitutional amendment proposed by S.J. Res. 135 would substantially eliminate these carefully drawn checks on the exercise of legislative power and would drastically -- and unnecessarily -- alter the existing relationships between the Executive and Legislative Branches. We believe strongly that any fundamental alteration of these limits would amount to seriously ill-advised tampering with the carefully constructed and tested constitutional scheme.

Even aside from our grave concerns about the wisdom of making fundamental changes in our constitutional structure governing the lawmaking and lawexecuting processes, we fear that authorization of one- and two-House legislative vetoes would have a substantial adverse impact on both the Legislative and Executive Branches and would in fact impede, rather than facilitate, the making and execution of laws. Granting one or both Houses of Congress the authority to veto Executive Branch decisions would inevitably introduce additional -- and often excessive -- delay into the decisionmaking process, would place a massive new burden on already scarce congressional

and Executive Branch resources and would decrease the impact of public participation and political accountability in the decisionmaking process. In addition, in those cases in which judicial review is available for particular Executive decisions, a provision for congressional approval or disapproval would introduce considerable uncertainty into the carefully structured relationship between administrative decisionmaking and judicial review, because the courts would be faced not only with administrative judgments, based on statutory criteria, but political judgments of Congress -- judgments courts have been generally reluctant to review. See, e.g., Perkins v. Lukens Steel Co., 310 U.S. 113, 130 (1940); Panama Canal Co. v. Grace Lines, 356 U.S. 309, 318-19 (1958); Kansas City Power & Light Co. v. McKay, 225 F.2d 924, 930-31 (D.C. Cir. 1955), cert. denied 350 U.S. 884 (1955).

We see little merit to the argument that has generally been advanced in support of legislative veto authority -- that such devices are necessary to maintain a proper balance between the Executive and Congress in the face of the vast delegation of policymaking power that has accompanied the phenomenon of modern regulation. Even if the premise were correct that Congress cannot, through legislation, deal with the many details of modern regulatory schemes, we see no reason to believe that Congress's inability to master detail through the formal legislative process would disappear if Congress were faced with the task of reviewing agency rules and the thousands of other Executive Branch decisions. The review by Congress of detailed rules, policies, and decisions made on a daily basis by the Executive Branch may well in practice be avoided for the same reasons that Congress tends to avoid enactment of detailed legislation, resulting in Congress's giving piecemeal attention to particularly sensitive or visible decisions, an approach that would be destructive of the stability and fairness of the laws and would be vulnerable to special interest political pressure.

This danger has been apparent since the earliest days of the Republic. In a letter in August 1787 regarding the proposed structure of the national government, Thomas Jefferson described the problem in these terms:

> Nothing is so embarrassing nor so mischievous, in a great assembly, as the details of execution. The smallest trifle of that kind occupies as

> long as the most important act of legislation and takes the place of everything else. Let any man recollect, or look over, the files of Congress; he will observe the most important propositions hanging over, from week to week, and month to month, till the occasions have past them, and the thing never done. I have ever viewed the executive details as the greatest cause of evil to us, because they in fact place us as if we had no federal head, by diverting the attention of that head from great to small subjects . . . . "

6 T. Jefferson, The Writings of Thomas Jefferson 228 (A. Bergh, ed. 1903) (letter to E. Carrington, Aug. 4, 1787).

Furthermore, S.J. Res. 135 would authorize legislation giving one or both Houses the power to veto actions taken by the President pursuant to statutory power which deeply implicates the President's conduct of the foreign policy of our Nation. Such power would have the predictable impact of preventing the President from implementing a coherent foreign policy that could be depended upon for its consistency, by friend and foe alike.

Moreover, there is considerable and compelling evidence that legislative vetoes simply have not served the purposes for which they were intended, and have, in fact, been counterproductive. 8/ Rather than fostering more participation in the policymaking process by members of Congress, legislative vetoes have provided Congress with a convenient excuse for excessive, overly-broad delegations of authority, have fostered nonaccountable decisionmaking and evasion of politically controversial decisions by the Legislative Branch, and have tended to undermine respect for the rule of law in that Congress may appear to use its authority in an arbitrary and capricious manner.

The fundamental problem that has given impetus to legislative veto provisions in the past is not that the allocation of power under our Constitution is skewed in favor of the

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8/ See, e.g., American Bar Association Commission on Law and The Economy, "Federal Regulation: Roads to Reform" (1979); Antonin Scalia, "The Legislative Veto: A False Remedy for System Overload" Regulation (November/December 1979).

Executive, but rather that the statutory standards pursuant to which the Executive Branch -- particularly the regulatory agencies -- operate are in many cases not well-defined, are too broad, and provide only limited guidance to the Executive in its execution and enforcement of the laws. In many cases Congress has asked the Executive Branch to make basic, vitally important policy choices that, at least in theory, are more properly for the legislature to make. This underlying problem would not in reality be addressed by giving Congress a "second shot" at reviewing Executive actions through a legislative veto process; the problem can only be fully addressed by Congress's giving the Executive Branch clear and precise guidance as to how, and to what ends, discretion should be exercised.

Finally, we see no compelling need for use of legislative veto devices to oversee or restrain Executive Branch decisions. Through Executive Order 12291, the President has been able to maintain oversight over the process of rulemaking by the non-independent Executive Branch agencies, both to ensure that the agencies scrutinize carefully the legal and factual basis for major rules in order that those rules maximize social benefits and minimize costs to the extent permitted by law, and to ensure a consistent, well-reasoned, Administration-wide approach to policies for which the Executive Branch is responsible. In addition, there are many effective and fully constitutional oversight and law-making mechanisms whereby Congress can carry out its constitutional functions. Particularly in the domestic area, Congress can limit its need to review the Executive's execution of the law by placing more specific and precise limits on the authority, for example, of agencies to issue rules. Congress, with participation by the President, can override unwise, inappropriate, or excessively burdensome rules or decisions made pursuant to statutorily delegated authority, by enactment of legislation. The use of expediting mechanisms for consideration of such legislation could facilitate speedy review, and would not have to be tied to the legislative veto devices with which they have so often been associated. Congress can also adopt sunset provisions that require agencies to return to Congress periodicially for reenactment of generic authority. Congress can hold oversight hearings, at which members of Congress may demand explanations for Executive Branch decisions. Congress can adopt resolutions expressing views, which may not be legally binding upon the Executive Branch, but which may be useful from a policy standpoint in the Executive Branch's implementation of the law. Ultimately, Congress can exercise the power of the purse, through the appropriations process, to shape Executive action, although

that process should be viewed as one of last resort because it often bypasses or fails to make maximum use of Congress's full expertise on a particular issue and it overburdens an already complex appropriations process.

The Administration is deeply interested in addressing concerns about the sharing of power within the federal government, and the need to improve or reform the process by which laws are made and executed -- concerns that are not necessarily new, but that have reemerged in the wake of the Chadha decision. However, we do not believe that a constitutional amendment to allow for legislative vetoes would either address those concerns adequately or would avoid a real danger of paralysis in the decisionmaking process in both the domestic and foreign affairs arenas. Even more importantly, we do not believe the Chadha decision should be the occasion for a fundamental alteration of the constitutionally mandated legislative process.

Accordingly, the Department of Justice opposes adoption of S.J. Res. 135 and transmittal of it to the states for ratification.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report to Congress and that it is in accord with the program of the Administration.

Sincerely,

ROBERT A. McCONNELL
Assistant Attorney General